UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	**Docket No.** RCRA-05-2014-0009
	)	
Indiana Dept. of Correction	)	**Proceeding to Commence and Conclude**
302 W. Washington St., Room E-334	)	**an Action to Assess a Civil Penalty and**
Indianapolis, Indiana 46204	)	**Issue a Compliance Order Under Section**
	)	**9006 of the Resource Conservation and**
	)	**Recovery Act, 42 U.S.C. § 6991e**
Respondent.	)	
	)	

CONSENT AGREEMENT AND FINAL ORDER

I. Jurisdiction and Authority

1. This civil administrative action is commenced and concluded under the authority vested in the Administrator of the United States Environmental Protection Agency (U.S. EPA) pursuant to Section 9006 of the Solid Waste Disposal Act (SWDA), as amended, also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6991e, and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) as codified at 40 C.F.R. Part 22. See Attachment A.

2. The Complainant is, by lawful delegation, the Director of the Land and Chemicals Division, U.S. EPA Region 5.

3. U.S. EPA provided notice of commencement of this action to the State of Indiana pursuant to section 9006(a) of SWDA, 42 U.S.C. § 6991e.

4. Respondent is the Indiana Department of Correction, 302 W. Washington St., Room E-334, Indianapolis, Indiana.

5. The parties agree that settling this action without the filing of a complaint or adjudication of any issue of fact or law is in their interest and in the public interest.

6. This Consent Agreement and its accompanying Final Order (CAFO) simultaneously commences and concludes this administrative penalty proceeding, as provided by Section 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.13(bb) and 22.18(b)(2) and (3), for Respondent's alleged violations of certain Underground Storage Tank (UST) regulations, as described specifically in Counts 1- 11, below.

7. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.

II. Statutory and Regulatory Background

8. Subchapter IX of the SWDA, 42 U.S.C. § 6691 et seq., regulates the installation and use of underground storage tanks (USTs) which are defined in Section 9001(1) of the SWDA, 42 U.S.C. § 6991(1), and 329 IAC-9-1-47.1 [40 C.F.R. § 280.12].

9. Section 9003 of SWDA, 42 U.S.C. § 6991b, requires the Administrator of U.S. EPA to promulgate release detection, prevention and correction regulations applicable to all owners and operators of USTs. These regulations are codified at 40 C.F.R. Part 280.

10. Under Section 9004 of SWDA, 42 U.S.C. § 6991c, the Administrator may approve a State program to administer the UST program in lieu of the federal program when the Administrator finds that the State program meets certain conditions. Any violation of regulations promulgated pursuant to Subtitle IX (Sections 9001 through 9010 of SWDA, 42 U.S.C. § 6001 through 6991i) or of any State provision approved under SWDA Section 9004, constitutes a violation of SWDA, subject to the assessment of civil penalties and issuance of compliance orders as provided in Section 9006 of SWDA, 42 U.S.C. § 6991e.

11. On July 12, 2006, U.S. EPA approved the State of Indiana Underground Storage Tank Program, effective August 11, 2006. 71 Fed. Reg. 39213 (July 12, 2006).

12. Section 9006 of SWDA, 42 U.S.C. § 6991e, authorizes U.S. EPA to initiate an enforcement action against any person found to be in violation of any requirement of SWDA Subchapter IX, including the State programs approved under Section 9004 of SWDA, 42 U.S.C. § 6991c.

III. Factual Allegations and Alleged Violations

13. Respondent is a "person" as defined in 329 IAC 9-1-35.2 [40 C.F.R. § 280.12], and is therefore subject to regulation under the SWDA.

14. Respondent was the "owner" and/or "operator" as defined in 329 IAC 9-1-34.1 and 35.1 [40 C.F.R. § 280.12] of tanks at the following facilities:

a. Indianapolis Re-Entry Educational Facility ("Indianapolis Facility", formerly known as the Indiana Women's Prison), 401 N. Randolph Street, Indianapolis, Indiana;
b. Pendleton Correctional Facility ("Pendleton Facility"), 4490 West Reformatory Road, Pendleton, Indiana; and
c. Wabash Valley Correctional Facility ("Wabash Valley Facility"), 6908 South Old U.S. Highway 41, Carlisle, Indiana.

Removal of all tanks at the facilities was completed prior to September 24, 2013.

15. Certain USTs at Respondent's facilities were used to accumulate regulated substances, at least 10% of which are below ground, and were otherwise "underground storage tanks" as defined in 329 IAC-9-1-47.1 [40 C.F.R. § 280.12].

16. U.S. EPA conducted combined Indiana Department of Environmental Management (IDEM) and U.S. EPA compliance inspections at: the Indianapolis Facility on May

21, 2009; the Pendleton Facility on August 12, 2009; the Wabash Valley Facility, on August 12, 2009.

17. U.S. EPA issued information requests to Respondent on April 5, 2010 and December 17, 2010, under SWDA Section 9005, 42 U.S.C. § 6991d. EPA received timely responses to these information requests.

18. On September 24, 2013, U.S. EPA issued a Pre-filing Notice (Notice) in this action to the Respondent. The Notice alleged that Respondent violated Section 9003 of RCRA, 42 U.S.C. § 6991b, and the UST regulations promulgated thereafter, at its Indianapolis Re-entry Educational Facility, Pendleton Correctional Facility, and Wabash Valley Correctional Facility.

19. At the time of the combined IDEM and U.S. EPA compliance inspections Respondent's Indianapolis Facility had one steel petroleum UST with a 1,000 gallon capacity that was: installed on May 22, 1992; temporarily closed in October 15, 2007; and permanently closed by removal on December 16, 2009.

20. At the time of the combined IDEM and U.S. EPA compliance inspections Respondent's Pendleton Facility had four steel petroleum USTs:

a. Tank 1 (f/k/a "Tank 2")– steel tank with 1,000 gallon capacity, steel piping, installed in August 1990;

b. Tank 2 (f/k/a "Tank 1")– steel tank with 10,000 gallon capacity, steel piping, installed in August 1990;

c. Tank 3 – steel tank with 5,000 gallon capacity, steel piping, installed in August 1990 ; and

d. Tank 4- steel tank with 8,000 gallon capacity, steel piping, installed in August 1990.

21. At the time of the combined IDEM and U.S. EPA compliance inspections Respondent's Wabash Valley Facility had five petroleum USTs:

a. Tank 1 (f/k/a "Tank 3") – fiberglass reinforced plastic, 10,000 gallon capacity, fiberglass reinforced plastic piping, installed March 1992;

b. Tank 2 (f/k/a "Tank 4") – fiberglass reinforced plastic, 10,000 gallon capacity, fiberglass reinforced plastic piping, installed March 1992;

c. Tank 3 (f/k/a "Tank 1") - fiberglass reinforced plastic, 6,000 gallon capacity, fiberglass reinforced plastic piping, installed June 1992;

d. Tank 4 (f/k/a "Tank 2")– fiberglass reinforced plastic, 4,000 gallon capacity, fiberglass reinforced plastic piping, installed June 1992; and

e. Tank 5 - fiberglass reinforced plastic, 10,000 gallon capacity, fiberglass reinforced plastic piping, installed December 1994.

COUNT 1 – Indianapolis Facility: Temporary Closure; Corrosion Protection

22. 329 IAC 9-6-5(a)(1) [40 C.F.R. § 280.70(a)] requires that when an UST system is temporarily closed, the owner and operator shall continue operation and maintenance of corrosion protection under 329 IAC 9-3.1-2 [40 C.F.R. § 280.31]. 329 IAC 9-3.1-2(2) [40 C.F.R. § 280.31(b)] requires that all tanks with galvanic cathodic protection systems be inspected within six (6) months of installation and at least every three (3) years thereafter.

23. Respondent's tank at the Indianapolis Facility was temporarily closed on October 15, 2007, and permanently closed on December 16, 2009. The tank had a galvanic cathodic

protection system. A July 12, 2007 corrosion protection test on the tank was performed. No inspection was performed between April 15, 2008 and December 16, 2009.

24. Respondent failed to comply with the tank corrosion protection requirements of 329 IAC 9-3.1-2(2) [40 C.F.R. § 280.31(b)]. Respondent therefore failed to comply with 329 IAC 9-6-5(a)(1) [40 C.F.R. § 280.70(a)] April 15, 2008 and December 16, 2009.

COUNT 2 – Indianapolis Facility: Temporary Closure; Tank Release Detection

25. 329 IAC 9-6-5(a)(2) [40 C.F.R. § 280.70(a)] requires that when an UST system is temporarily closed, the owner and operator shall continue operation and maintenance of any release detection under 329 IAC 9-7 [40 C.F.R. Part 280, Subpart D]. 329 IAC 9-7-1 and 2 [40 C.F.R. §§ 280.40 and 280.41] contain certain release detection requirements, including requirements for all UST systems and requirements for petroleum UST systems in particular. Further, under 329 IAC 9-7-4 [40 C.F.R. § 280.43], release detection methods for tanks in petroleum UST systems must consist of equipment for automatic tank gauging, vapor monitoring, ground-water monitoring, interstitial monitoring, or certain other release detection methods.

26. Respondent's tank at the Indianapolis Facility was temporarily closed on October 15, 2007, and permanently closed on December 16, 2009. No release detection methods were ever used for the tank.

27. Respondent did not use any release detection methods for the tank before it was emptied, and therefore failed to comply with the tank release detection requirements of 329 IAC 9-7-1 and 2 [40 C.F.R. Part 280, Subpart D]. Therefore, Respondent failed to comply with 329 IAC 9-6-5(a)(2) [40 C.F.R. § 280.70(a)] from October 15, 2007 to December 16, 2009.

COUNT 3 – Indianapolis Facility: Temporary Closure; Vent Lines

28. 329 IAC 9-6-5(b)(1) [40 C.F.R. § 280.70(b)(1)] requires that when an UST system is temporarily closed for three (3) months or longer, the owner and operator shall leave vent lines open and functioning.

29. Respondent's tank at the Indianapolis Facility was temporarily closed on October 15, 2007, and permanently closed on December 16, 2009. During the temporary closure of the tank, Respondent did not leave vent lines open and functioning.

30. Respondent failed to comply with 329 IAC 9-6-5(b)(1) [40 C.F.R. § 280.70(b)(1)] from January 15, 2008 to December 16, 2009.

COUNT 4 – Indianapolis Facility: Temporary Closure; Cap and Secure

31. 329 IAC 9-6-5(b)(2) [40 C.F.R. § 280.70(b)(2)] requires that when an UST system is temporarily closed for three (3) months or longer, the owner or operator shall cap and secure various tank components (lines, pumps, manways, ancillary equipment).

32. Respondent's tank at the Indianapolis Facility was temporarily closed on October 15, 2007, and permanently closed on December 16, 2009. During the temporary closure of the tank, Respondent did not cap and secure various tank components (lines, pumps, manways, ancillary equipment) until December 10, 2009.

33. Respondent failed to comply with IAC 9-6-5(b)(2) [40 C.F.R. § 280.70(b)(2)] from January 15, 2008 to December 10, 2009.

COUNT 5 – Indianapolis Facility: Permanent Closure

34. 329 IAC 9-6-5(c) [40 C.F.R. § 280.70(c)] requires that when an UST system is temporarily closed for twelve (12) months or longer, the owner and operator shall permanently close the UST system.

35. Respondent's tank at the Indianapolis Facility was temporarily closed on October 15, 2007, and permanently closed on December 16, 2009. Respondent did not permanently close the UST system from October 15, 2008 to December 16, 2009.

36. Respondent failed to comply with the permanent closure requirements of 329 IAC 9-6-5(c) [40 C.F.R. § 280.70(c)] from October 15, 2008 to December 16, 2009.

COUNT 6 – Indianapolis Facility: Record Maintenance

37. 329 IAC 9-3-1(c)(1) [40 C.F.R. § 280.34(b)(2)] requires that the owner and operator of an UST facility shall maintain documentation of the operation and maintenance of corrosion protection equipment.

38. Respondent did not have documentation of the operation and maintenance of corrosion protection equipment during the May 21, 2009 inspection by EPA.

39. Respondent failed to comply with the record maintenance requirements of 329 IAC 9-3-1(c)(1) [40 C.F.R. § 280.34(b)(2)] on May 21, 2009.

COUNT 7 – Pendleton Facility – Piping Corrosion Protection

40. 329 IAC 9-2-1(2)(B) [40 C.F.R. § 280.20(b)(2)] provides that steel piping for any new tank system, for which installation began after December 22, 1988, must be properly designed and constructed, and if the piping is constructed of steel, it must be cathodically protected from corrosion and maintained as required under 329 IAC 9-3.1-2 [40 C.F.R. §

280.31]. 329 IAC 9-3.1-2 [40 C.F.R. § 280.31] requires the operation and maintenance of corrosion protection, including the performance of inspections within six (6) months of installation and at least every three (3) years thereafter.

41. Tanks 1, 2 and 3 at Respondents' Pendleton Facility were installed in August 1990, and the steel piping associated with each tank were therefore required to have cathodic inspections in February 1991 and in February 1994, 1997, 2000, 2003, 2006, 2009 and 2012. However, inspections of the cathodic protection systems associated with the steel piping for Tanks 1, 2 and 3 at Respondent's Pendleton Facility were not conducted from August 1990 to August 12, 2009, in violation of 329 IAC 9-3.1-2(a) [40 C.F.R. § 280.31(b)] and 329 IAC 9-2-1 (2) [40 C.F.R. § 280.20(b)].

COUNT 8 – Pendleton Facility: Tank Leak Detection

42. 329 IAC 9-7-2(1) [40 C.F.R. § 280.41(a)] requires that tanks must be monitored every thirty (30) days for release using one of the methods listed in 329 IAC 9-7-4(4-8) [40 C.F.R. § 280.43(d-h)] (equipment for automatic gauging; testing/monitoring for vapors within soil gas; testing/monitoring for liquids on groundwater; interstitial monitoring between the UST and a secondary barrier; or certain other types of release detection methods) except tanks installed after December 22, 1988 may use monthly inventory and tank tightness testing.

43. Tanks 1, 2 and 3 at Respondent's Pendleton Facility were installed in August 1990 did have equipment for automatic tank gauging, but were not monitored every thirty (30) days between August 1990 and August 12, 2009 (with the exception of February 28, 2010), in violation of 329 IAC 9-7-2(1) [40 C.F.R. § 280.41(a)].

COUNT 9 – Pendleton Facility: Line/Piping Leak Detection

44. 329 IAC 9-7-2(2)(B) [40 C.F.R. § 280.41(b)(2)] requires that underground piping under suction that routinely contains regulated substances must be monitored for releases by either (1) having a line tightness test under 329 IAC 9-7-5(2) [40 C.F.R. § 280.44(b)] every three (3) years or (2) use a monthly monitoring method (testing/monitoring for vapors within soil gas; testing/monitoring for liquids on groundwater; interstitial monitoring between the UST and a secondary barrier; or certain other types of release detection methods) under 329 IAC 9-7-5(3)[40 C.F.R. § 280.44(c)].

45. Tanks 1, 2 and 3 at Respondent's Pendleton Facility were installed in August 1990, have underground piping under suction that routinely contains regulated substances, and were therefore required to have either: (1) line tightness testing in August 1993, 1996, 1999, 2002, 2005, 2008 or (2) monthly monitoring from August 1990 forward. Respondent did not perform line tightness testing at any of the tanks. No monthly monitoring of lines/piping for Tank 3 was performed at Respondent's Pendleton Facility between November 2008 and April 2010. No monthly monitoring of lines/piping for Tanks 1 and 2 was performed at Respondent's Pendleton Facility between November 2008 and April 2010 (with the exception of February 16, 2009). Therefore, Respondent violated 329 IAC 9-7-2(2)(B) [40 C.F.R. § 280.41(b)(2)].

COUNT 10 – Wabash Valley Facility: Tank Leak Detection

46. 329 IAC 9-7-2(1) [40 C.F.R. § 280.41(a)] requires that tanks must be monitored every thirty (30) days for release using one of the methods listed in 329 IAC 9-7-4(4-8) [40 C.F.R. § 280.43(d-h)] (equipment for automatic gauging; testing/monitoring for vapors within soil gas; testing/monitoring for liquids on groundwater; interstitial monitoring between the UST

and a secondary barrier; or certain other types of release detection methods) except tanks installed after December 22, 1988 may use monthly inventory and tank tightness testing.

47. Tanks 3 and 4 at Respondent's Wabash Valley Facility have equipment for automatic tank gauging, but the tanks were not monitored between November 2008 and April 2010, in violation of 329 IAC 9-7-2(1) [40 C.F.R. § 280.41(a)].

COUNT 11 – Wabash Valley Facility: Line/Piping Leak Detection

48. 329 IAC 9-7-2(2)(B) [40 C.F.R. § 280.41(b)(2)] requires that underground piping under suction that routinely contains regulated substances must be monitored for releases by either (1) having a line tightness test under 329 IAC 9-7-5(2) [40 C.F.R. § 280.44(b)] every three (3) years or (2) use a monthly monitoring method (testing/monitoring for vapors within soil gas; testing/monitoring for liquids on groundwater; interstitial monitoring between the UST and a secondary barrier; or certain other types of release detection methods) under 329 IAC 9-7-5(3)[40 C.F.R. § 280.44(c)].

49. Tanks 3 and 4 were installed at Respondent's Wabash Valley Facility in June 1992, and were therefore required to have either: (1) line tightness testing in December 1992, and June 1995 1998, 2001, 2003, 2006, 2009 and 2012 or (2) monthly monitoring from June 1993 forward. No line tightness testing or monthly monitoring was done between August 2005 and April 2010 for Tanks 3 and 4 at Respondent's Wabash Valley Facility (with the exception of April 2007 for Tank 3 and May 2007 for Tank 4), in violation of 329 IAC 9-7-2(2)(B) [40 C.F.R. § 280.41(b)(2)].

IV. Terms of Settlement

50. Respondent admits the jurisdictional and general allegations alleged in this Consent Agreement.

51. Respondent neither admits nor denies the factual allegations in this CAFO.

52. Respondent consents to the assessment of the civil penalty and to the performance of a Supplemental Environmental Project (SEP) as described in this Consent Agreement.

53. Respondent consents to the execution and filing of the accompanying Final Order without additional notice.

54. Respondent waives any right it may have to file an Answer and request a hearing.

55. Respondent consents to any and all other conditions specified in this Consent Agreement.

56. Respondent waives any right to contest or appeal the jurisdictional or factual allegations contained in this Consent Agreement.

57. Respondent waives any right to appeal the terms of the accompanying Final Order.

58. Respondent waives any rights it may possess in law or equity to challenge the authority of the U.S. EPA to bring a civil action in an appropriate United States District Court to compel compliance with this CAFO and/or to seek additional penalties, if Respondent fails to comply with any provision of this CAFO.

59. Respondent agrees this CAFO shall apply to and be binding upon Respondent, its officers, directors, employees, assigns and successors in interest. Respondent shall give notice

and a copy of this CAFO to any successor in interest prior to any transfer of ownership or operational control of the facilities described in paragraph 14, above.

60. This Consent Agreement constitutes a full settlement only for the aforementioned UST claims. This CAFO does not constitute a waiver by the U.S. EPA of its remedies, either judicial or administrative, for any other matter. Nothing in this CAFO is intended to, nor shall be construed to operate in any way resolve any criminal liability of Respondent that may arise from the factual allegations described above. Compliance with this CAFO shall not be a defense to any actions subsequently commenced pursuant to other federal laws and regulations administered by U.S. EPA, and it is the responsibility of the Respondent to comply with such laws and regulations.

V. Certification of Compliance

61. Respondent certified that it is fully complying with Subchapter IX of SWDA, 42 U.S.C. § 6991 et seq., and 40 C.F.R. Part 280, with respect to the underground storage tanks noted in paragraph 14, above, and which are the subject of this Consent Agreement.

VI. Civil Penalty

62. U.S. EPA has assessed the civil penalty specified herein in accordance with the factors listed in Section 9006 of SWDA, 42 U.S.C. § 6991e(c), which requires the Administrator of U.S. EPA to consider any good faith efforts to comply with the applicable requirements and the seriousness of the violations. These requirements have been incorporated in the "U.S. EPA Penalty Guidance for Violations of the UST Regulations" (November 14, 1990), as amended (Penalty Guidance). This Penalty Guidance provides a rational, consistent and equitable calculation methodology for applying the penalty factors enumerated above to the specific facts

of any particular case. In using the Penalty Guidance, U.S. EPA calculated an initial proposed penalty in the amount of $224,947. However, after settlement discussions, U.S. EPA has determined that an appropriate civil penalty to resolve this matter is $24,500 and a SEP in the amount of $135,500.

63. Respondent agrees to pay a civil penalty within thirty (30) days of the effective date in the amount of $24,500. Payment shall be made by state warrant, certified or cashier's check, payable to "Treasurer, United States of America," and shall be sent to:

For checks sent by regular U.S. Postal Service mail:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

For checks sent by express mail

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

64. The check shall bear Respondent's name and the docket number of this CAFO. A transmittal letter stating Respondent's name, complete address, and the docket number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

U.S. EPA Region 5
Office of the Regional Hearing Clerk
Attention: La Dawn Whitehead
77 W. Jackson Blvd.
Mailcode: E-19J
Chicago, IL 60604-3590

Estelle Patterson, UST Enforcement Officer (LR-8J)
Underground Storage/Tanks Section, RCRA Branch
Land and Chemicals Division
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Catherine Garypie, Associate Regional Counsel (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

65. If Respondent violates this CAFO, U.S. EPA may refer collection of this penalty with interest, handling charges, nonpayment penalties, and the United States enforcement expenses for the collection action, to the United States Department of Justice for action in the appropriate United States District Court, in accordance with Section 9006 of SWDA, 42 U.S.C. § 6991e(a). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.

66. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Respondent must pay a fifteen dollar ($15) handling charge each month that any portion of the penalty is more than thirty (30) days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount ninety (90) days past due.

67. This civil penalty is not deductible for federal tax purposes.

VII. Supplemental Environmental Project

68. Respondent must complete a SEP designed to protect the environmental and public health by developing and implementing an Environmental Management System (EMS) at the

following facilities within one (1) year of the Effective Date of this Consent Agreement, including:

a. creating an Environmental Management Systems Manual consistent with the U.S. EPA "Compliance-Focused Environmental Management System-Enforcement Agreement Guidance" (including but not limited to a requirement that IDOC conduct an annual EMS audit) within sixty (60) days of the Effective Date of this Consent Order, with a copy to U.S. EPA for review and approval;

b. upon receipt of U.S. EPA's approval of the Environmental Management Systems Manual, performing four (4) quarterly or one (1) annual inspection at each facility (timing designated below) with a written confirmation of the completion of all EMS quarterly and annual inspections (including but not limited to record review, training facility staff, recording deficiencies, reporting as required to appropriate agencies as required, and conducting a closeout meeting) to U.S. EPA within thirty (30) days of the completion of the last inspection:

    1. Indiana State Prison, 1 Park Row, Michigan City, IN 46360 (quarterly);
    2. Westville Correctional, 5501 South 1100 West, Westville, IN 46391 (quarterly);
    3. Miami Correctional, 3038 West 850 South, Bunker Hill, IN 46914-9810 (quarterly);
    4. Pendleton Correctional, 4490 W. Reformatory Rd., Pendleton, IN 46064-9001 (quarterly);

5. Plainfield Correctional, 501 W. Main Street, Plainfield, Indiana 46168 (quarterly);
6. Putnamville Correctional 1946 West U.S. Hwy 40, Greencastle, IN 46135 (quarterly);
7. Wabash Valley Correctional, 6908 S. Old U.S. Highway 41, Carlisle , IN 47838 (quarterly);
8. Logansport Juvenile, 1118 South State Road 25, Logansport, IN 46947 (annual);
9. Camp Summit, 2407 N 500 W, Laporte, IN 46350 (annual);
10. Madison Juvenile/Madison Correctional, 800 MSH Bus Stop Drive, Madison, IN 47250 (annual);
11. Pendleton Juvenile, 9310 South State Road 67, Pendleton, IN 46064 (annual);
12. Chain O' Lakes Correctional, 3516 E 75 South, Albion, IN 46701 (annual);
13. Edinburgh Correctional, 23rd & Schoolhouse Road, Edinburgh, IN 46124 (annual);
14. Henryville Correctional, 1504 Schlamn Lake; Henryville, IN 47126 (annual);
15. Indianapolis Re-entry, 401 North Randolph Street, Indianapolis, Indiana 46201 (annual);

16. South Bend Re-entry, 4650 Old Cleveland Road, South Bend IN, 46628 (annual);

17. Branchville Correctional, 21390 Old State Road 37, Branchville, IN 47514 (annual);

18. Rockville Correctional, 811 W. 50 N, Rockville, IN 47872 (annual); and

19. Indiana Women's Prison, 2596 Girl's School Road, Indianapolis, IN 46214 (annual).

69. Respondent must implement the SEP in accordance with the Project Description and Scope of Work attached to this Consent Agreement as Attachment B. The Project Description and Scope of Work constitute an enforceable part of this Consent Agreement.

70. Respondent must spend at least $135,500 for the first contract year on this SEP. At the completion of the SEP, Respondent will provide the actual cost expended for the project to U.S. EPA.

71. Respondent certifies that it is not required to perform or develop the SEP by any law, regulation, grant, order, or agreement, or as injunctive relief as of the date it signs this CAFO.

72. Respondent certifies that it is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in Section VII; and it has inquired of the SEP implementer whether the SEP implementer is a party to an open federal financial assistance transaction that is funding or could fund the same activity as the SEP and has been informed by the SEP implementer that the SEP implementer is not a party to such a transaction.

73. Respondent must submit to U.S. EPA a Final Completion Report within sixty (60) days of completion of the SEP. The final report must contain the following information:

a. Detailed description of the SEP as completed;

b. Description of any implementation problems and any actions taken to correct the problems;

c. Itemized costs of goods and services used to complete the SEP documented by copies of invoices, purchase orders, or canceled checks that specifically identify and itemize the individual costs of the goods and services;

d. Certification that Respondent has completed the SEP in compliance with this CAFO; and

e. Description of the environmental and public health benefits resulting from the SEP (quantify the benefits and pollution reductions, if feasible).

74. Respondent must submit all notices and reports required by this CAFO by first class mail to:

Estelle Patterson, UST Enforcement Officer (LR-8J)
Underground Storage/Tanks Section, RCRA Branch
Land and Chemicals Division
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

75. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and, based on my inquiry of those individuals responsible for obtaining the information, that the information is true and complete

to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

76. Following receipt of the SEP completion report described in paragraph 73 above, U.S. EPA will notify Respondent in writing that:

a. It has satisfactorily completed the SEP report and the SEP;

b. There are deficiencies in the SEP report or in the SEP, and U.S. EPA will give Respondent thirty (30) days to correct the deficiencies; or

c. It has not satisfactorily completed the SEP report or the SEP, and U.S. EPA will seek stipulated penalties under paragraph 77 below.

77. If U.S. EPA exercises option 76.b. above, Respondent may object in writing to the deficiency notice within ten (10) days of receiving the notice. The parties will have thirty (30) days from U.S. EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, U.S. EPA will give Respondent a written decision on its objection. Respondent will comply with any requirements that U.S. EPA imposes in its decision. If Respondent does not complete the SEP as require by U.S. EPA's decision, Respondent will pay stipulated penalties to the United States under paragraph 78 below.

78. If Respondent violates any requirement of this CAFO relating to the SEP, Respondent must pay stipulated penalties to the United States as follows:

a. Except as provided in subparagraph 78.b, below, if Respondent did not complete the SEP satisfactorily according to this CAFO, Respondent must pay a stipulated penalty in the amount of $100,000.

b. If Respondent did not compete the SEP satisfactorily, but U.S. EPA determines that Respondent: (i) made good faith and timely efforts to complete the SEP; and (ii) certified, with supporting documents, that it spent at least ninety (90) percent of the required amount on the SEP, Respondent will not be liable for any stipulated penalty.

c. If Respondent satisfactorily completed the SEP, but spent less than ninety (90) percent of the required amount on the SEP, Respondent must pay a stipulated penalty in the amount of $135,500, minus the amount actually spent on the SEP.

d. If Respondent failed to timely submit the SEP completion report required by paragraph 73 above, Respondent must pay a stipulated penalty of $200 for each day after the report was due until it submits the report.

79. U.S. EPA's determination of whether Respondent satisfactorily completed the SEP and whether it made good faith, timely efforts to complete the SEP will bind Respondent.

80. Respondent must pay stipulated penalties within fifteen (15) days of receipt of U.S.EPA's written demand for the penalties.

81. Any formal public statements, oral or written, in print, film or other media, that Respondent makes referring to the SEP must include the following language, "This project was undertaken in connection with the settlement of an enforcement action by the U.S. Environmental Protection Agency for violations of Section 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. Section 6991(e)."

82. If an event occurs which causes or may cause a delay in completing the SEP as required by this CAFO:

a. Respondent must notify U.S. EPA in writing within five (5) days after learning of the event which caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay, and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify U.S. EPA according to this paragraph, Respondent will not receive an extension of time to complete the SEP.

b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.

c. If U.S. EPA does not agree that circumstances beyond Respondent's control caused or may cause a delay in completing the SEP, U.S. EPA will notify Respondent in writing of its decision, and any delays in completing the SEP will not be excused.

d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased costs for completing the SEP will not be a basis for an extension of time under subparagraph b, above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

VIII. Additional Stipulations

83. Neither the assessment nor payment of a civil penalty will affect Respondent's continuing obligation to comply with the UST regulations and any other applicable federal, State, or local law.

84. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the Complaint.

85. This CAFO does not affect the right of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

86. This CAFO does not affect Respondent's responsibility to comply with Subtitle I of RCRA and other applicable federal, State, local laws and permits.

87. This CAFO is a "final order" for purposes of 40 C.F.R. § 22.31, and U.S. EPA's "Penalty Guidance for Violations of UST Regulations" (OSWER Directive 9610.12, dated November 14, 1990), as revised by memoranda dated May 9, 1997, September 21, 2004, December 28, 2008, April 6, 2010, and December 6, 2013 (to reflect changes in penalty amounts required under several Civil Monetary Penalty Adjustment Rules).

88. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

89. Each party agrees to bear its own costs and attorney's fees in this action.

90. This CAFO constitutes the entire agreement between the parties.

IX. Reservation of Rights

91. Notwithstanding any other provision of this CAFO, an enforcement action may be brought pursuant to Section 9003(h) of RCRA, 42 U.S.C. § 6991b(h), or other statutory

authority, should U.S. EPA find that the release of regulated substances from an UST may have occurred and implementation of any corrective action is needed to address such release.

92. U.S. EPA reserves the right to take enforcement action against Respondent for any future violations of RCRA Subtitle I, and the implementing regulations, and to enforce the terms and conditions of this CAFO.

93. Except as expressly provided herein, nothing in this CAFO shall constitute or be construed as prohibiting, altering, or in any way limiting the ability of U.S. EPA to seek any other remedies or sanctions, including the right to seek criminal enforcement or the right to initiate an action for imminent and substantial endangerment, available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this CAFO is based, or for Respondent's violation of any applicable provisions of law. Compliance with this CAFO shall not be a defense against any action subsequently commenced pursuant to federal laws and regulations administered by U.S. EPA, and it is the responsibility of the Respondent to comply with such laws and regulations.

94. Except as expressly provided herein, nothing in this CAFO shall constitute, a release from any claim (civil or criminal), cause of action, or demand in law or equity by or against any person, firm, partnership, entity or corporation for any liability it may have arising out of or relating in any way to Respondent's management of the USTs located at the Indianapolis Re-entry Educational Facility, the Pendleton Correctional Facility); and the Wabash Valley Correctional Facility.

X. Parties Bound

95. This CAFO shall be binding upon U.S. EPA and Respondent and their successors and assigns. Respondent shall cause its officers, directors, employees, agents, and all persons, including independent contractors, contractors, and consultants acting under or for Respondent, to comply with the provisions hereof in connection with any activity subject to this CAFO.

96. No change in ownership, partnership, corporate, or legal status relating to the Indiana Department of Correction will in any way alter Respondent's obligations and responsibilities under this CAFO.

XI. Effective Date

97. The effective date of this CAFO shall be date on which the CAFO is filed with the Regional Hearing Clerk.

In the Matter of:

Indiana Dept. of Correction
302 W. Washington St. Room E-334
Indianapolis, Indiana 46204
Docket No. RCRA-05-2014-0009

Indiana Department of Correction, Respondent

6.9.14
Date

Bruce Lemmon, Commissioner
Indiana Department of Correction

In the Matter of:
Indiana Dept. of Correction
302 W. Washington St. Room E-334
Indianapolis, Indiana 46204
Docket No. RCRA-05-2014-0009

United States Environmental Protection Agency, Complainant

6/18/2014
Date

Margaret M. Guerriero, Director
Land and Chemicals Division

In the Matter of:
Indiana Dept. of Correction
302 W. Washington St. Room E-334
Indianapolis, Indiana 46204
Docket No. RCRA-05-2014-0009

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

6/19/2014
Date

Susan Hedman, Regional Administrator
United States Environmental Protection Agency
Region 5

ATTACHMENT A

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits as codified at 40 C.F.R. Part 22

(e) Any applications shall, if received by an EPA Regional Office, be forwarded promptly to the appropriate State for action pursuant to section 7(g)(2) of the Small Business Act and these regulations.

(f)(1) EPA will generally not review or approve individual statements issued by a State. However, SBA, upon receipt and review of a State approved statement may request the Regional Administrator of EPA to review the statement. The Regional Administrator, upon such request can further approve or disapprove the State issued statement, in accordance with the requirements of § 21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with § 21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in § 21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§ 21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.

Subpart B—Parties and Appearances

Subpart C—Prehearing Procedures

AUTHORITY: 7 U.S.C. 136(l); 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g–3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

SOURCE: 64 FR 40176, July 23, 1999, unless otherwise noted.

Subpart A—General

§ 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a));

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

(4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty

under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in part 24 of this chapter;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. 1319(g), 1321(b)(6), and 1342(a));

(7) The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") (42 U.S.C. 11045);

(9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. 300g–3(g)(3)(B), 300h–2(c), and 300j–6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c);

(10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304).

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

(c) Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

§ 22.2 Use of number and gender.

As used in these Consolidated Rules of Practice, words in the singular also include the plural and words in the masculine gender also include the feminine, and vice versa, as the case may require.

§ 22.3 Definitions.

(a) The following definitions apply to these Consolidated Rules of Practice:

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Business confidentiality claim means a confidentiality claim as defined in 40 CFR 2.201(h).

Clerk of the Board means the Clerk of the Environmental Appeals Board, Mail Code 1103B, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Commenter means any person (other than a party) or representative of such person who timely:

(1) Submits in writing to the Regional Hearing Clerk that he is providing or intends to provide comments on the proposed assessment of a penalty pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Clean Water Act or section 1423(c) of the Safe Drinking Water Act, whichever applies, and intends to participate in the proceeding; and

(2) Provides the Regional Hearing Clerk with a return address.

Complainant means any person authorized to issue a complaint in accordance with §§ 22.13 and 22.14 on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be a member of the Environmental Appeals Board, the Regional Judicial Officer or any other person who will participate or advise in the adjudication.

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in 40 CFR 1.25.

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

(2) An initial decision which becomes a final order under § 22.27(c); or

(3) A final order issued in accordance with § 22.18.

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

Party means any person that participates in a proceeding as complainant, respondent, or intervenor.

Permit action means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1412) or termination under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or section 3005(d) of the Solid Waste Disposal Act (42 U.S.C. 6925(d)).

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

Regional Administrator means, for a case initiated in an EPA Regional Office, the Regional Administrator for that Region or any officer or employee thereof to whom his authority is duly delegated.

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

Respondent means any person against whom the complaint states a claim for relief.

(b) Terms defined in the Act and not defined in these Consolidated Rules of Practice are used consistent with the meanings given in the Act.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

§ 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice; acts as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters; and approves settlement of proceedings under these Consolidated Rules of

Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

(2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer may:

(1) Conduct administrative hearings under these Consolidated Rules of Practice;

(2) Rule upon motions, requests, and offers of proof, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice.

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another Region to replace the Administrator. The Regional Administrator shall assign a new Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law Judge if the original Administrative Law Judge withdraws or is disqualified.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. Documents filed in proceedings before the Environmental Appeals Board shall either be sent by U.S. mail (except by U.S. Express Mail) to the official mailing address of the Clerk of the Board set forth at § 22.3 or delivered by hand or courier (including deliveries by U.S. Postal Express or by a commercial delivery service) to Suite 600, 1341 G Street, NW., Washington, DC 20005. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

(2) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be filed with the Regional Hearing Clerk. Parties who correspond directly with the Presiding Officer shall file a copy

of the correspondence with the Regional Hearing Clerk.

(3) A certificate of service shall accompany each document filed or served in the proceeding.

(b) *Service of documents.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

(C) Where respondent is a State or local unit of government, agency, department, corporation or other instrumentality, complainant shall serve the chief executive officer thereof, or as otherwise permitted by law. Where respondent is a State or local officer, complainant shall serve such officer.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service.

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All filed documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic service, subject to any appropriate conditions and limitations.

(c) *Form of documents.* (1) Except as provided in this section, or by order of the Presiding Officer or of the Environmental Appeals Board there are no specific requirements as to the form of documents.

(2) The first page of every filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with this section.

Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

(d) *Confidentiality of business information.* (1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

(2) Two versions of any document which contains information claimed confidential shall be filed with the Regional Hearing Clerk:

(i) One version of the document shall contain the information claimed confidential. The cover page shall include the information required under paragraph (c)(2) of this section and the words "Business Confidentiality Asserted". The specific portion(s) alleged to be confidential shall be clearly identified within the document.

(ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

(4) Only the second, redacted version shall be treated as public information. An EPA officer or employee may disclose information claimed confidential in accordance with paragraph (d)(1) of this section only as authorized under 40 CFR part 2.

[64 FR 40176, July 23, 1999, as amended at 69 FR 77639, Dec. 28, 2004]

§ 22.6 Filing and service of rulings, orders and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

§ 22.7 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these Consolidated Rules of Practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.

§ 22.8 *Ex parte* discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Clerk of the Board, as appropriate.

(b) The cost of duplicating documents shall be borne by the person seeking copies of such documents. The Agency may waive this cost in its discretion.

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention and non-party briefs.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or the Environmental Appeals Board for good cause.

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply

to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

(b) *Severance.* The Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to § 22.14.

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Complaint.

(a) *Content of complaint.* Each complaint shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

(3) A concise statement of the factual basis for each violation alleged;

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; or

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

(d) *Oral argument.* The Presiding Officer or the Environmental Appeals

Board may permit oral argument on motions in its discretion.

§ 22.17 Default.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a

waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under § 22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to § 22.13(b), the consent agreement shall also contain the elements described at § 22.14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

§ 22.19 Prehearing information exchange; prehearing conference; other discovery.

(a) *Prehearing information exchange.* (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not

been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

(1) Settlement of the case;

(2) Simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) The time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of

settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with § 22.5(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the

testimony and shall be subject to appropriate oral cross-examination.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

§ 22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for

filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c)

and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. Appeals sent by U.S. mail (except by U.S. Postal Express Mail) shall be addressed to the Environmental Appeals Board at its official mailing address: Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Appeals delivered by hand or courier (including deliveries by U.S. Postal Express Mail or by a commercial delivery service) shall be delivered to Suite 600, 1341 G Street, NW., Washington, DC 20005. One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record,

initial decision, or opposing brief. Appellee shall simultaneously serve one copy of the response brief upon each party , non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall file notice of its intent to review that decision with the Clerk of the Board, and serve it upon the Regional Hearing Clerk, the Presiding Officer and the parties within 45 days after the initial decision was served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion, order oral argument on any or all issues in a proceeding.

(e) *Motions on appeal.* All motions made during the course of an appeal shall conform to §22.16 unless otherwise provided.

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

[64 FR 40176, July 23, 1999, as amended at 68 FR 2204, Jan. 16, 2003; 69 FR 77639, Dec. 28, 2004]

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to §22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to §22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on

overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to § 22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to § 22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

§ 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies this notice requirement.

§ 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved]

§ 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) ("SWDA"). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

§ 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act ("CWA")(33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

§ 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

§ 22.40 [Reserved]

§ 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section 207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

§ 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

§ 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.

(a) *Scope of this subpart.* The supplemental rules of practice in this subpart shall also apply in conjunction with the Consolidated Rules of Practice in this part and with the administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of

the Resource Conservation and Recovery Act. Notwithstanding the Consolidated Rules of Practice, these supplemental rules shall govern with respect to the termination of such permits.

(b) In any proceeding to terminate a permit for cause under § 122.64 or § 270.43 of this chapter during the term of the permit:

(1) The complaint shall, in addition to the requirements of § 22.14(b), contain any additional information specified in § 124.8 of this chapter;

(2) The Director (as defined in § 124.2 of this chapter) shall provide public notice of the complaint in accordance with § 124.10 of this chapter, and allow for public comment in accordance with § 124.11 of this chapter; and

(3) The Presiding Officer shall admit into evidence the contents of the Administrative Record described in § 124.9 of this chapter, and any public comments received.

[65 FR 30904, May 15, 2000]

§ 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

(ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought; and

(v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) A commenter may present written comments for the record at any time prior to the close of the record.

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final order.* (i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District

Court, with coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

(ix) If judicial review of the final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk.

§§ 22.46–22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

§ 22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to all adjudicatory proceedings for:

(1) The assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)).

(2) The assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)), except where a respondent in a proceeding under section 1414(g)(3)(B) requests in its answer a hearing on the record in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

The Presiding Officer shall be a Regional Judicial Officer. The Presiding Officer shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed.

§ 22.52 Information exchange and discovery.

Respondent's information exchange pursuant to § 22.19(a) shall include information on any economic benefit resulting from any activity or failure to act which is alleged in the administrative complaint to be a violation of applicable law, including its gross revenues, delayed or avoided costs. Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

PART 23—JUDICIAL REVIEW UNDER EPA-ADMINISTERED STATUTES

Sec.

AUTHORITY: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j–7(a)(2), 300j–9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 28 U.S.C. 2112(a), 2343, 2344.

SOURCE: 50 FR 7270, Feb. 21, 1985, unless otherwise noted.

ATTACHMENT B

PROJECT DESCRIPTION AND SCOPE OF WORK FOR SUPPLEMENTAL ENVIORNMENTAL PROJECT

3/17/14 Letter from K. Holcomb (August Mack) to C. Garypie (U.S. EPA)

August Mack
ENVIRONMENTAL

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March 17, 2014

Ms. Catherine Garypie
U.S. EPA Region V
Office of Regional Counsel
77 West Jackson Blvd. (C-14J)
Chicago, Illinois 60604

Re: Application for Supplemental Environmental Project
Environmental Management System
Settlement Negotiations for UST Violations
Indiana Department of Corrections
Indianapolis, Indiana
August Mack Proposal Number PO0164.240

Dear Ms. Garypie:

On behalf of the Indiana Department of Corrections (IDOC), August Mack Environmental, Inc. (August Mack) is submitting the following application for a Supplemental Environmental Project (SEP) to be included in settlement negotiations in order to mitigate the monetary penalty associated with violations of the Resource Conservation and Recovery Act (RCRA) as outlined in the Pre-filing Notice issued by the United States Environmental Protection Agency (USEPA) on September 24, 2013 and subsequently received by the IDOC on October 4, 2013. The Pre-Filing Notice was in response to the RCRA Inspections conducted at the Indianapolis Re-Entry Educational Facility on May 21, 2009 and the Wabash Valley and Pendleton Correctional Facilities on August 12, 2009.

The United States Environmental Protection Agency's (USEPA) Supplemental Environmental Projects Policy (effective May 1, 1998) outlines the types of projects that are permissible as SEPs, the appropriate penalty mitigation, and the terms and conditions under which the SEP can become part of a settlement. Proposed SEPs are evaluated based on the following five steps:

(1) Ensure that the project meets the basis definition of a SEP.
(2) Ensure that all legal guidelines, including nexus, are satisfied.
(3) Ensure that the project fits within one (or more) of the designated categories of SEPs.
(4) Determine the appropriate amount of penalty mitigation.
(5) Ensure that the project satisfies all of the implementation and other criteria.

This Application will provide information in order to assist the USEPA in evaluating the proposed SEPs according to the criteria listed in the 1998 SEP Policy.

Proposed SEP: Implementation of an Environmental Management System

The EMS will be a system of maintaining environmental compliance with applicable regulations. The system, however, goes beyond just compliance. The EMS will also provide a system of checks and balances for the IDOC facilities. Once the IDOC is involved with the EMS, a site manager makes routine site visits to the facilities. During these site visits, all aspects of the facilities' environmental programs are reviewed, records are checked and updated, training is conducted and documented, deficiencies are recorded, reporting to appropriate agencies is completed if required, and a closeout meeting is conducted with upper management where any issues noted during the inspection are reviewed. Any issues requiring further attention are disseminated to the appropriate personnel where they are addressed.

Quarterly site inspections will be conducted at the following IDOC facilities:

1. Indiana State Prison
2. Westville Correctional
3. Miami Correctional
4. Pendleton Correctional
5. Plainfield Correctional
6. Putnamville Correctional
7. Wabash Valley Correctional

Annual site inspections will be conducted at the following IDOC facilities:

1. Logansport Juvenile
2. Camp Summit
3. Madison Juvenile/Madison Correctional
4. Pendleton Juvenile
5. Chain O' Lakes Correctional
6. Edinburgh Correctional
7. Henryville Correctional
8. Indianapolis Re-entry
9. South Bend Re-entry
10. Branchville Correctional
11. New Castle Correctional
12. Rockville Correctional
13. Indiana Women's Prison

The EMS will check on the status of the actions conducted in the subsequent routine site inspections. Following the completion of each site visit, a formal report is submitted to the facility with written documentation as to the issues discussed in the closeout

meeting. Action items and responsible parties are spelled out clearly as part of the report, as are consequences of non-compliance. All documentation for the EMS is placed on a site specific, password protected website.

August Mack will develop and implement an Environmental Management System (EMS) for all Indiana correctional facilities. The EMS will be developed in accordance with the USEPA's Compliance-Focused Environmental Management System-Enforcement Agreement Guidance (CFEMS) (Revised June 2005). As indicated in the USEPA's CFEMS, an EMS shall be organized into the following key elements: Environmental Policy; Organization, Personnel, and Oversight of EMS; Accountability and Responsibility; Environmental Requirements; Assessment, Prevention, and Control; Environmental Incident and Noncompliance Investigations; Environmental Training, Awareness, and Competence; Environmental Planning and Organizational Decision-Making; Maintenance of Records and Documentation; Pollution Prevention Program; Continuing Program Evaluation and Improvement; and Public Involvement/Community Outreach. August Mack will prepare an Environmental Management System Manual outlining the EMS at IDOC according to these 12 key elements and develop a list of action items that need to be performed in order to improve this system. The EMS will provide yearlong assistance in implementing and maintaining the items addressed in the EMS Manual. In addition, an annual EMS audit will be performed in order to periodically evaluate the overall status of the EMS.

(1) Ensure that the project meets the basis definition of a SEP.
SEPs are defined as environmentally beneficial projects, which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.

In order to be considered "environmentally beneficial" the SEP must improve, protect, or reduce risks to public health, or the environment at large. Implementation of the IDOC EMS is environmentally beneficial in that it is continually assessing the IDOC's impact to the environment as well as providing training and assessments to increase employee awareness of environmental regulations. This subsequently reduces risk to the environment due to detection of potential threats in various environmental media and increased awareness of environmental regulations and hazards onsite.

IDOC will be implementing the EMS in response to the initial RCRA Inspections conducted at the Indianapolis Re-Entry Educational Facility on May 21, 2009 and the Wabash Valley and Pendleton Correctional Facilities on August 12, 2009 and subsequent Pre-filing Notice issued by the United States Environmental Protection Agency (USEPA) on September 24, 2013. IDOC is willing to work with the USEPA during this settlement process in order to further clarify the scope for the upcoming

contract years. Therefore, implementation of the EMS should be considered "in settlement of an enforcement action".

Although the entire EMS contract includes completion of regulatory reporting requirements for the large facilities, annual training requirements, and assistance with required recordkeeping, these portions of the program are not being included in the SEP cost as defined in a later section of this application. In addition, any costs associated with activities performed in order to return to compliance following the May 21, 2009 and August 12, 2009 RCRA inspection violations will not be included in the SEP cost. Therefore, the remainder of the EMS is a supplemental activity that IDOC will be implementing in order to take a proactive approach to environmental compliance and is considered "not otherwise legally required to perform." Annual auditing of the EMS and development of the EMS Manual would also be considered supplemental activities.

(2) ***Ensure that all legal guidelines, including nexus, are satisfied.***
The 1998 SEP Policy uses five legal guidelines to ensure that the proposed SEP is within the USEPA's and federal court's authority, and do not run afoul of any Constitutional or statutory requirements. These guidelines are listed below and include a description of how the EMS falls within these guidelines.

1. *A project cannot be inconsistent with any provision of the underlying statutes.*
The EMS is a multimedia environmental compliance inspection and assistance program which will be developed to meet all the key EMS elements and, therefore, is not inconsistent with the underlying statutes.

2. *All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:*
   a. *the project is designed to reduce the likelihood that similar violations will occur in the future; or*
   b. *the project reduces the adverse impact to public health or the environment which the violation at issue contributes; or*
   c. *the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.*

   The violations observed at the IDOC facilities were related to underground storage tanks (UST) at the Pendleton Correctional Facility, Wabash Valley Correctional Facility, and the Indianapolis Re-Entry Education Facility, and include:
   - Improper operation and maintenance of tank and piping corrosion protection;

- Improper operation and maintenance of tank, line, and piping leak detection;
- Failure to leave vent lines open and function during temporary closure;
- Failure to cap and secure tank components during temporary closure;
- Failure to permanently close the UST system once the tank has been temporarily closed for over 3 months;
- Failure to submit a notification of tank closure at least 30 days prior to closure;
- Failure to submit a tank closure report within 30 days after UST removal; and,
- Failure to maintain records required for UST compliance.

The EMS will greatly reduce the likelihood that these violations would occur in the future due to third-party involvement in the environmental compliance success of the IDOC. The EMS system will provide IDOC with a group of experienced environmental professionals that are available to address questions that may arise involving UST or other multimedia environmental compliance issues onsite. In addition, August Mack will conduct regular site visits at the IDOC facilities in order to identify any environmental compliance issues that IDOC may not be aware of and will work with management to determine corrective actions in order to reduce risk to the environment.

3. *EPA may not play any role in managing or controlling funds that may be set aside or escrowed for the performance of a SEP. Nor may EPA retain authority to manage or administer the SEP. EPA may, of course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.*

IDOC is aware of this guideline and will work with the USEPA to ensure that the SEP agreed upon in the settlement agreement is carried out appropriately.

4. *The type and scope of each project are defined in the signed settlement agreement.*

IDOC is prepared to work with the USEPA over the course of these settlement negotiations in order to adequately define the type and scope of the proposed SEPs within the settlement agreement.

5. *a. A project cannot be used to satisfy EPA's statutory obligation of another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, EPA cannot consider projects that would appear to circumvent that prohibition.*
b. A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds or has earmarked funds in an appropriations committee report. Further, a project cannot be used to satisfy EPA's statutory or earmark obligation, or another federal

agency's statutory obligation, to spend funds on a particular activity. A project, however, may be related to a particular activity for which Congress has specifically appropriated or earmarked funds.

c. A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors.

d. A project many not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.

The EMS is a service performed by August Mack, an independent environmental consulting firm, at the IDOC facilities. The program is paid for by the IDOC and does not involve any activities designated to be performed by a federal agency or with federal funds. All further development of the EMS will also meet these criteria.

(3) *Ensure that the project fits within one (or more) of the designated categories of SEPs.*

August Mack's EMS would fit within the "Other Types of Projects" SEP category according to the June 2003 USEPA "Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects."

(4) *Determine the appropriate amount of penalty mitigation.*

August Mack will begin the EMS development and implementation process immediately following the USEPA's approval of the EMS as a SEP. The cost associated with the EMS implementation for the first contract year is presented in the table below, broken down by facility where applicable (required reporting for the seven large facilities is included in the table below, but will not be a part of the SEP). The total cost for the development and implementation of the SEP, excluding reporting, will be $135,500 for the first contract year. The EMS assessment site inspections assume a total of four visits at each of the large facilities per year and one visit at each of the small facilities per year. If additional site visits are required, additional costs will be incurred. These costs assume that the USEPA will allow August Mack personnel to conduct the annual EMS audit.

TABLE 1
COSTS

Task	Cost
Development of EMS Manual	$10,000
EMS Assessment Audits[1]	$96,500
Annual EMS Audit	$10,000
EMS Training and Quarterly Meetings	$10,000
Recordkeeping	$6,000
Public Outreach	$3,000
Subtotal Cost for EMS Implementation	*$135,500*
Annual Required Reporting[2]	$54,200
Total	**$189,700**

[1] See Table 2 for cost per facility.
[2] Reporting is only for the seven (7) large facilities.

TABLE 2
EMS ASSESSMENT AUDIT COSTS PER FACILITY

Facility	Site Inspection Cost
Large Facilities (4 site visits per year):	
Indiana State Prison	$9,200
Westville Correctional	$9,200
Miami Correctional	$8,500
Pendleton Correctional	$7,900
Plainfield Correctional	$7,600
Putnamville Correctional	$8,200
Wabash Valley Correctional	$9,400
Small Facilities (1 site visit per year):	
Logansport Juvenile	$2,700
Camp Summit	$3,100
Madison Juvenile/ Madison Correctional	$3,200
Pendleton Juvenile[1]	$2,200
Chain O'Lakes Correctional	$3,000
Edinburgh Correctional	$2,500
Henryville Correctional	$2,800
Indianapolis Re-Entry	$2,400
South Bend Re-Entry	$2,900
Branchville Correctional	$3,400

Facility	Site Inspection Cost
New Castle Correctional	$2,500
Rockville Correctional	$3,100
Indiana Women's Prison	$2,700
Total	**$96,500**

[1]Pendleton Juvenile travel cost is included with the Pendleton Correctional cost.

IDOC understands that according to the 1998 SEP Policy, a minimum penalty amount will be required and that the USEPA will determine the SEP mitigation percentage during settlement negotiations. Please note that IDOC and August Mack are willing to work with the USEPA in order to achieve the highest mitigation percentage allowable. IDOC is committed to improving operations at their facilities in order to reduce potential risks to the environment.

(5) ***Ensure that the project satisfies all of the implementation and other criteria.***

1. *Liability for Performance*
   IDOC understands that they are responsible and legally liable for ensuring that the agreed upon SEPs are completed satisfactorily.

2. *Oversight and Drafting Enforceable SEPs*
   IDOC understands that the SEPs agreed upon with the USEPA need to be drafted to accurately and completely describe the SEP and completion will need to be verified. IDOC will work with the USEPA during settlement negotiations to properly describe the requirements of the SEP in the settlement agreement.

3. *Failure of a SEP and Stipulated Penalties*
   IDOC understands that a SEP must be completed as outlined in the settlement agreement and an additional penalty may be incurred if the SEP is not completed satisfactorily.

4. *Community Input*
   IDOC understands that the USEPA may seek community input during settlement negotiations.

5. *EPA Procedures*
   IDOC understands that the appropriate parties must approve the proposed SEPs and a detailed explanation of the SEP will be included in the case documentation and may constitute confidential settlement information.

If you have any questions or comments, or require additional information, please do not hesitate to contact us at 317.916.8000.

Sincerely,

Katie Holcomb

Katie Holcomb
Staff Engineer

Charles J. Staehler
Principal Engineer

cc: Kevin Orme – Indiana Department of Corrections
Tim Junk – Indiana Attorney General's Office

In the Matter of: Indiana Dept. of Correction, 302 W. Washington St. Room E-334, Indianapolis, Indiana 46204, Docket No. RCRA-05-2014-0009

CERTIFICATE OF SERVICE

I, CHARLES RODRIGUEZ, hereby certify that I delivered a copy of the foregoing Consent Agreement and Final Order, Docket No. **RCRA-05-2014-0009**, to the person designated below, on the date below, to:

Copy by U.S. Mail, certified-return receipt requested, postage prepaid to:

Bruce Lemmon, Commissioner
Indiana Dept. of Correction
302 W. Washington St. Room E-334
Indianapolis, Indiana 46204

One copy by U.S. Mail, certified-return receipt requested, postage prepaid to:

Indiana Department of Correction
c/o Timothy J. Junk, Deputy Attorney General
State of Indiana
Office of the Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 46204-2770

Original and one copy hand-delivered to:

US EPA Region 5
Office of the Regional Hearing Clerk
Attention: La Dawn Whitehead
77 W. Jackson Blvd.
Mailcode: E-19J
Chicago, IL 60604-3590

One copy hand-delivered to:

Ann L. Coyle, Regional Judicial Officer
US EPA, Region 5
77 W. Jackson Blvd.
Mail Code: C14-J
Chicago, IL 60604

Dated this 24 day of JUNE, 2014.

Charles Rodriguez, Student Assistant
Office of Regional Counsel
U.S. EPA, Region 5